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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1112

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTORS TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Petitioners.

against

NETTIE GELFAND and PHILLIP GELFAND,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB D. FUCHSBERG,
250 Broadway,
New York, N. Y. 10007,
Counsel for Respondent.

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Questions Presented

Were appellants' activities within the State of New York sufficient to justify the imposition of the judicial jurisdiction in New York within the requirements of due process of law?

Is there presented by the petitioner a substantial constitutional question of such scope and importance that it should be reviewed by this Court?

Statement of the Case

This is an action for personal injuries arising out of an accident which occurred in Arizona in May, 1962. Plaintiffs were passengers on a "Gray Line" Scenic Motor Bus owned and operated by the defendants. The plaintiffs, husband and wife who were and are residents of the State of New York residing in Long Island, purchased tickets in New York for a Gray Line Scenic Motor Tour, as part of a planned vacation in the west. The Gray Line Tour began in Las Vagas, Nevada and was planned to encompass an overnight stay at the Grand Canyon in Arizona. While the bus was travelling in Arizona, the wheel of the bus broke off, causing an accident in which plaintiffs were injured, The complaint herein contains counts based both on negligence and upon a breach of contract of said carriage and for a safe vehicle.

Plaintiffs instituted the instant action against six named defendants. Three of the defendants, Tanner Motor Tours, Ltd. (a California Corporation), Tanner Motor Tours of Nevada, Ltd. (a Nevada Corporation), moved to dismiss the complaint for want of personal jurisdiction; the other three defendants made no appearance herein.

Six copies of the complaint were served on a Mr. Herbert DeGraff, the New York representative of the Gray Line Sight-Seeing Companies Associated, Inc. (hereinafter "Gray Line Association"). In addition, the Marshal's returns herein show that copies of the complaint were served upon the defendants in Los Angeles and Las Vegas.

Plaintiffs made arrangements through the Herren-Rogers Travel Service in Lynbrook, Long Island, for a vacation trip, the total cost of which was somewhat in excess of $1,000.

One part of plaintiffs' vacation trip was a Gray Line Scenic Motor Tour between Las Vegas, Nevada and the

Grand Canyon in Arizona scheduled for May 4, 1962. The cost of this Gray Line Tour was $80.

In early April, 1962, Mrs. Herren received confirmation for plaintiffs' trip from the hotels, bus lines and other facilities involved. Plaintiffs paid Mrs. Herren the balance of the cost of the trip and received two tickets and a confirmation of reservations for the Gray Line Tour. Mrs. Herren remitted the monies that she had received from plaintiffs to the various firms involved withholding her commissions.

Defendants operate a bus tour and motor livery service out of Las Vegas, Nevada and Los Angeles, California, under various trade names including Tanner Gray Line Mor Tours. The trade name "Gray Line" is used by defendant pursuant to a license from the Gray Line Association which is a non-profit membership corporation organized under the laws of Maryland. Gray Line Association is a trade association comprised of over ninety members engaged in the business of providing sightseeing and tour services throughout North America. The Association itself does not operate any tour services. Rather the Association licenses use of the Gray Line trademark and promotes the interest of its members. The defendants are members of the Gray Line Association. They pay dues and fees to the Association and receive in return, among other things, national advertising, public relations and other services.

Gray Line Association had a representative in New York, one Herbert J. DeGraff, who is listed in the Association Sightseeing Tariff as the Regional Vice-President of the Gray Line, in charge of sales for the Eastern Division with an office on Madison Avenue, in New York City. Mr. DeGraff, in addition to his services for the Gray Line represents other clients, including air lines and hotels. In this capacity, Mr. DeGraff's telephone number is listed in the Manhattan Telephone Directory under the name of Gray Line Association. The name of Gray Line Association

appears on the building directly for 501 Madison Avenue and upon the doors of Mr. DeGraff's office suite.

Among the services which Gray Line Association renders to its members is the publication of a Sight-Seeing Tariff containing descriptions of all the various tours offered by the member bus companies and the rates therefor. In this tariff there is contained a full-page picture of Mr. Herbert J. DeGraff who is referred to as "Regional Vice-President-Sales-Eastern Division" in an office at 501 Madison Avenue, New York, New York. Beneath the pictures of three Regional Vice Presidents in charge of Sales, including Mr. DeGraff, the following is stated:

> "GRAY LINE SALES OFFICERS AT YOUR SERVICE"
>
> "Gray Line Sales Offices have been established for your benefit and are equipped to assist you in processing of all Gray Line Services, rent-a-car, limousine, package tours, transfers, charter bus, boat sight-seeing trips, and special services for conventions and group travel. Gray Line Sales Offices are located in Chicago, New York, San Francisco and Los Angeles."

The inside of the back cover of the Tariff bears the following legend at the top:

> "Gray Line World's Largest Best Sight-Seeing Organization."

On the pages devoted to describing defendants' bus tours the defendant is referred to as Gray Line of Las Vegas. Gray Line of Las Vegas operates a sight-seeing, charter and transit bus service and rent-a-car in Clark County, Nevada, Boulder Dam and Grand Canyon, Arizona.

In the years 1960 to 1963, the gross revenues of this company were as follows:

1960	$320,995
1961	329,286
1962	344,250
1963	200,643

With its companion corporation, Tanner Motor Tours of Los Angeles, the Tanner Gray Line is the largest single operating company in the Gray Line organization, accounting for 14% to 15% total Gray Line sight-seeing business.

DeGraff Inc. had a contract with Gray Line under which it was retained for $23,500 a year, payable monthly in advance to perform the following duties on behalf of Gray Line Association:

> "A. To represent Gray Line as travel representative and agent in the Eastern portion of the United States as specified by Executive Committee directives.
>
> B. To familiarize itself fully with all services and facilities offered by Gray Line members.
>
> C. To contact and fraternize with travel forwarders situated in the Eastern portion of the United States.
>
> D. To take letters for folders and other printed material prepared for distribution by Gray Line and Gray Line members.
>
> E. To gather all available information on specialized group movements and forward such advice to interested Gray Line members.
>
> F. To compile data on all conventions which will occur in cities where there are interested Gray Line members and forward such reports to such members.
>
> G. To advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members.
>
> H. To maintain an office in New York properly staffed to run the above services and assist in processing all Gray Line orders.
>
> I. To promote the overall welfare of Gray Line."

Carrying out his obligations under the contract, DeGraff performed among other things, the following services: He

employed a sales and reservation staff which would vary from a peak of about eighteen people in the peak period of the year to a minimum of around thirteen or fourteen (107). Of these, outside salesmen would number four or five to seven or eight (107). These outside salesmen would solicit business for Gray Line among others. They would call on travel agents, airlines, steamships, bus lines and determine if there were any people moving into areas where Gray Line renders service, and if they did, attempt to sell them on Gray Line service. They would see if the travel agents were working on any special group or special new programs and suggest Gray Line services as part of these programs (108). They would call on the tour departments of the airlines to see if the airline had any tours coming up. They would call on travel agents trying to call on each travel agent four times a year, with some of the big ones getting perhaps twenty-five calls a year (114).

DeGraff is not a travel agent. He deals with travel agents, and attempts to cultivate them in the interests of Gray Line, attending industry dinners and meetings and seeing the travel agents. As part of his work, he designs tours for the participation of travel agents. These tours would be designed so as to include elements of Gray Line services on the sight-seeing end so as to create business for the Gray Line bus companies. These would be in the nature of tie-in sales. The airlines would advertise something such as "Go to California for $350, including everything." The travel agents would participate by putting out brochures describing in specifics the details of the tour. The tour would of course when worked out by DeGraff, include Gray Line sightseeing.

DeGraff also, through his contacts, through his reading publications, through his attending trade meetings, attempted pursuant to his contract to keep up to date as to what kind of people were travelling to which areas and to

advise on these matters. It was in the nature of market research that he was doing.

DeGraff would also make sure that the various travel agents in the area were supplied with folders and brochures from the Gray Line. He would take such orders as the travel agents were out of them and forward them to Gray Line in Chicago to fill these orders out of their warehouse and distribute the folders and brochures to the travel agents as needed.

Also, from time to time, there would be complaints about the service that had been rendered from travel agents on behalf of their customers and these complaints would be forwarded to DeGraff who would ask for refunds or adjustments on the part of the people and/or their travel agents.

From time to time, also, travel agents would not pay a bill and DeGraff would get an inquiry from various Gray Line operators including the Las Vegas Gray Line and he would investigate to find out why a bill had not been paid.

In addition, the travel wholesalers, with whom DeGraff dealt, that is the travel agents who create tours that would be sold by other travel agents on a retail basis, were entitled for their work to an over-ride commission, depending upon the volume of their business and whether they met certain requirements with regard to the printing of Gray Line brochures and distributing of literature containing the name Gray Line. DeGraff would negotiate with these wholesalers the amount of their over-ride or the net price for the tour to the wholesaler which would enable them to mark up the tour and thus receive their payment.

DeGraff would also participate in the planning of tours. If there was a tour that was not selling, he would, from time to time communicate with the tour operator and advise him that the tour would have to be changed as to time and date or something else so that it could be sold. He would

participate in giving recommendations as to the planning of tours prior to the printing of Tariffs and schedules and if anything went wrong, whereby the tour was not selling, he would bring it to the attention of the tour operator after the Tariff came out. He would do that for Gray Line of Las Vegas.

On occasion, once a year usually, DeGraff would collect money from the various bus companies who were members of the Gray Line for the purchase of give-aways which he was using in promotions. In 1965, he purchased 5,000 cameras in New York for the purpose of promational give-aways and collected the money from the Gray Line members for this.

In addition to DeGraff's activities, relating to the solicitation, creation and facilitation of travel business through wholesalers, transportation companies and travel agents, DeGraff performs one further service for defendant, Tanner Motor Tours of Nevada Ltd. This service is not generally performed for the other Gray Line companies.

Most of Gray Line sight-seeing tours require no reservation. That is because they are short tours and Gray Line undertakes that anyone who shows up with a ticket will be provided with the service. However, Tanner Motor Tours of Nevada offers a tour of the Grand Canyon which requires hotel reservations at the Grand Canyon overnight. Because hotel rooms are required, reservations for this tour are required. Requests for reservations come in typically from travel agents. If there is space available the reservation is confirmed and notification is sent to Gray Line of Las Vegas, notifying them of the booking. In the years 1962, 1963, 1964 and 1965 the reservations booked by DeGraff in his New York office would amount to approximately 3,000 per year. The total hotel facilities at the Grand Canyon would amount to about 7,000 total passengers. So that of the total capacity of this tour, DeGraff's New York office books 3/7ths the total gross revenues from

the 3,000 reservations per year booked for Gray Line of Las Vegas would amount to $120,000 per year. This would be out of a total gross income of $200,000 to $300,000 per year. Merely for the reservations on the one Grand Canyon tour, which is only one of the tours which the defendant operates, this would amount to 60% of the defendant's gross business in some years (137). The service is crucial to the success of the tour and thus of the company. The reason it is necessary to have this central reservations service operated by DeGraff was explained by Mr. DeGraff. He said at the hearing below:

> "If I could bring this point out, there are about 5,000 travel agents in the United States. For the Grand Canyon to keep those 5,000 agents informed as to the availability of hotel rooms would not only be a big job but it would be economically disastrous for them to try and mail out or telephone 5,000 agents every day to keep them informed as to what the status is, and so rather than do that, we are kept informed and the agent calls us because there are only two ways you can get to the Grand Canyon up until this year; that was by Santa Fe Railroad or Gray Line."
>
> • • •
>
> "It is an easier line of communication, it is better for the customer as well, because they can find out in a minute whether the customer can go or not rather than wait a week or ten days to get an answer back by mail."

This is because DeGraff is more current on Gray Line reservations than even the company itself, because his offices are all tied together by teletype and he is advised daily. Peculiarly this reservation work is not mentioned in DeGraff's contract with Gray Line. The service evolved as DeGraff put it, "By fifteen years of degeneration." The reason DeGraff inherited this obligation was,

"It added up that this was the only way you could merchandise that tour of the Grand Canyon and it just evolved over the years."

To run this reservation service, Mr. DeGraff had to hire a not insignificant staff. One reservation clerk can handle about 40 of those reservations a day. There are half a dozen clerks working on Grand Canyon reservations, though not exclusively. What they do is look up on the board where the hotel reservation schedule is kept and see whether the hotel is available. If it is they book the reservation. In return for these various services, the $23,000 paid by Gray Line to DeGraff amounts to 17% of the gross revenues of his office in New York (149).

The enumeration of DeGraff's services for Gray Line of Las Vegas, does not yet end. In addition to providing the central reservations service and all of the solicitation, packaging, market research and tour design services which has been above described, DeGraff actually sells tickets on the various Tanner Tours, collects the money and remits. These sales come about in two ways at least. In the first place, it someone were to call up DeGraff's office relying on his listing as Regional Sales Office for Gray Line and ask for a reservation, DeGraff's office after trying to encourage the person to see a travel agent would sell the ticket on the tour, collect the proceeds and remit to Tanner Motor Tours in Las Vegas (98-99). In addition, frequently, when selling a tour to an airline, the tour might include such things as car rental, limousine service from the airport and sight-seeing tours on the Tanner facilities. The airline would prepay these services by issuing an exchange order for whatever monies were required and DeGraff would remit to the company providing the service and collect the draft from his bank. This would happen in DeGraff's words "often".

The defendants' business in New York does not cease with DeGraff. In 1963, there were some 57 travel agents

who made sales on behalf of Tanner in New York. The travel agent issuing tickets in advance sometimes after confirming reservations with DeGraff and if it were for a tour that did not require reservation, merely issuing the ticket without consulting anyone. A duplicate of the ticket would be sent to Tanner as an advisory. This would presumably be accompanied by the remuneration, less commission, if the agent did not have credit arrangements and would be unaccompanied by remuneration if the agent did have credit arrangements. If the agent did have credit arrangements, the monies would be paid along with any other monies owing for any other tickets on ordinary commercial credit terms. The result is, of course, that not only does Tanner sell tickets in New York, with payment being made in New York, but maintains at any one time a rather large volume of accounts receivable owing to them by the various travel agents who have sold tickets on their behalf.

In addition the Gray Line Tariff, page 60, lists Tanner Motor Tours Ltd. as an Avis Rent-A-Car agency. Avis Rent-A-Car Inc. is a Delaware corporation with its principal place of business at Roosevelt Field, Garden City, New York. The Avis franchisee is Tanner Motor Livery Ltd., who is authorized to use the Avis name in the rent-a-car business in Southern California and Las Vegas, Nevada. In connection with operating this Avis Rent-A-Car franchise, Tanner is in the position that vehicles owned by it are transported all over the country and on various occasions have travelled from California and/or Nevada to New York and have been returned from New York to their point of origin. In addition, the Avis Rent-A-Car System, Inc., issues credit cards to the public which are used to rent cars at various stations. The central billing department, located in New York, collects the amount of these charges from the customer and remits to the licensee. During the six months prior to the hearing, Avis collected over $10,000 for rental of cars by Tanner through its cen-

tral billing procedure and remitted same to Tanner. This central billing procedure has existed between Avis Rent-A-Car System, Inc. and Tanner Motor Livery Ltd. since 1958.

Opinions Below

On petitioners' motion to dismiss the United States District Court for the Eastern District of New York dismissed the action for lack of personal jurisdiction over the defendants saying:

> "While defendants' affidavit are most unimpressive and are hardly very frank, and the existence of 'Gray Line Sightseeing Companies Associated' invites allusions to estoppels to deny; what finally emerges, is the bare, familiar picture of a carrier which performs all its carrier service far from New York and solicits business here through independent travel 'agents' or consolidated ticket 'agents'. The accident out of which the claims arise happened in Arizona."

The Court of Appeals for the Second Circuit reversed and remanded the matter for further proceedings (339 F. 2d 317) saying:

> "Hopefully the hearing will make clear the full scope and importance of DeGraff's activities on behalf of defendants and the closeness of the relationship between DeGraff and defendants through the Gray Line of which defendants are members."

After remand and following further hearings, Judge Dooling again dismissed the action. On appeal the Court of Appeals again reversed, saying:

> "In our view the decisive test is that upon which the court in Frummer relied 'the [reservation] service does all the business which [defendant corporation] could do were it here by its own officials' 281 N.Y.S.

2d at 44. In the context of the Frummer case, we take this to mean that a foreign corporation is doing business in New York 'in the traditional sense' when its New York representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporations own officials would undertake to perform similar services.

Mr. DeGraff testified that the reason his office booked reservations for Tanners Grand Canyon Tours was that 'this was the only way that you could *merchandise* that tour of the Grand Canyon' . . .

We conclude that Tanner's reliance upon DeGraff Associates for three-sevenths of its business on the Grand Canyon Tour, generating $120,000 a year in bookings confirmed in New York is sufficient contact with New York to satisfy the due process requirements of *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310 (1945) and establish a systematic course of doing business in New York . . ."

Summary of Argument

1. The Court of Appeals was clearly correct in upholding jurisdiction. The scope, breadth and importance of DeGraff's activities, in New York on behalf of petitioner performed on a systematic basis more than met the "minimal contacts" requirements of *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310 (1945).

It is not determinative that DeGraff was not a salaried employee of petitioners. If they had not made the arrangement they did with DeGraff they would have had to maintain salaried officers in New York to perform DeGraff's work.

Since they derived three-sevenths of their bookings on the Grand Canyon Tour from DeGraff's office in New York

amounting to $120,000 per year it is not unfair or unreasonable to require petitioners to defend in New York a suit by New York residents injured on that tour.

2. This case presents no constitutional question of general interest or application. Presented is merely one more in an almost limitless number of varying factual situations which must be weighed utilizing principles laid down in *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310 (1945), in order to determine whether there is sufficient contact with the forum to make it fair to require an out of state corporation to defend a suit in that jurisdiction. For this reason there is no conflict between the decision of the Court of Appeals for the Second Circuit herein and the decision in the Fifth Circuit, in *Turner* v. *Jack Tar Grand Bahama, Ltd.,* 353 F. 2d 954. In that case, the facts were different. There was far less contact with the forum state than is the fact in the case at bar.

POINT I

It is not violative of due process of law to require the petitioners to defend this action in New York.

We regard it as clear, as the Court of Appeals held, that petitioners' activities in New York were sufficient to meet traditional "presence" requirements.

A discussion of whether or not a foreign transportation company is doing business within the State must of necessity begin with *Green* v. *Chicago Burlington and Quincy Railway Co.,* 205 U. S. 530. There an out-of-state railroad company maintaining no tracks within the State of Pennsylvania did maintain an office manned by several clerks and soliciting agents for the solicitation of freight and passenger traffic. This Court held that the defendant rail-

road was not subject to jurisdiction in Pennsylvania and announced as its rationale the now famous "mere solicitation" rule.

In *International Harvester* v. *Kentucky,* 234 U. S. 579, however, this Court made clear that this "mere solicitation" rule was unique to out-of-state transportation or hotel companies, since it said, with regard to an out-of-state manufacturer whose agents maintained no permanent office within the State of Kentucky and whose sole function as travelling salesmen was to solicit the sale of merchandise which would be subject to the approval of the general agent outside the state and which after approval would result in shipments F.O.B. some point outside of the state of goods to within the state, that the company was doing business within the State of Kentucky. This court said:

> "Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of Harvester Company were delivered within the State of Kentucky. This was a course of business not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts."

It was therefore clear under the rule announced in *International Harvester* v. *Kentucky, supra,* that any continuous course of solicitation which results in shipments of goods into a state constitutes doing business. This rule was adopted in New York in the case of *Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259. In the *Tauza* case, *supra,* Judge Cardozo, emphasizing the fact that the order received resulted in the shipment of goods into the state held the defendant to be doing business within New York. The Court said:

> "That there is no precise test of the nature or extent of the business that must be done. All that is requi-

site is that enough be done to enable us to say that the corporation is here."

In the language of Judge Learned Hand in *French* v. *Gibbs Corp.*, 189 F. 2d 787, 790 (2nd Cir. 1931):

> "Any continued local activities meets the strict presence requirements; the rest is merely a matter of more or less."

And in *Barnett* v. *Texas and Pac. Ry. Co.*, 145 F. 2d 800, the Second Circuit Court of Appeals held that an out-of-state railway was doing business in New York where the volume of freight and passenger business initiated in New York was slight when the defendant's New York office actually sold tickets for transportation on defendant's line and issued bills of lading in New York on irregular basis, this Court said:

> "Defendant contends that the District Court correctly held that its decision was compelled by the 'solicitation' doctrine of Green v. Chicago B. & Q. R. Co., 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916, that in International Harvester v. Kentucky, 234 U. S. 579, 586, 34 S. Ct. 1944, 58 L. Ed. 1479, the Court referred to the Green case as 'extreme'. In Hutchinson v. Chase and Gilbert, 2 Cir., 45 F. 2d 139, 141, this Court per Judge L. Hand, said 'Possibly the maintenance of a regular agency for the solicitation of business will serve without more.' The answer made in Green v. C. B. & Q. R. Co., 205 U. S. . . . perhaps becomes somewhat doubtful in light of International Harvester Co. v. Kentucky. . . and if it still remains true it readily yields to slight addition. See also Jacobowitz v. Thomson, 141 F. 2d 72. Here there were more than 'slight additions' i.e. the actual selling of tickets for transportation on defendants' line and the issuance of bills of lading in New York to say nothing of the handling of complaints. It is urged that not many of these acts occurred each

year. That those acts were authorized by defendant which put no limit on the number of such acts that its employees may perform. We think that the authorized performance of such acts constitutes doing business in New York, even if the volume of freight and passenger business initiated in New York is not as great as we may surmise defendant would like it to be."

This Court's landmark decision in *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310, formulated the presence requirements as follows at page 316:

". . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

"Minimum contacts" were said by this Court to constitute:

". . . such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection:" *International Shoe Co.* v. *State of Washington, supra,* at page 317.

As this Court also said in *International Shoe Corp.* v. *State of Washington,* at page 317:

" 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no con-

sent to be sued or authorization to an agent to accept service of process has been given."

Here we have no "casual presence of a corporate agent" or "his conduct of single isolated items of activity in the State" but a continuous and systematic carrying out of business in New York. In *Bryant* v. *Finnish National Airlines,* 15 N. Y. 2d 428, the New York Court of Appeals held that the defendant was doing business in New York. It made clear that the mere fact that the defendant did not operate its airlines within New York State, was not determinative. The Court stated that the test for doing business "is and should be a simple pragmatic one". The fact that the defendant maintained an office in New York, staffed by several employees and had a bank account in New York and "does public relations and publicity work for the defendant here including maintaining contacts with other airlines and travel agencies and while it does not make reservations or sell tickets, it transmits requests for space to defendant in New York, and helps to generate business. These things should be enough". The Court said.

It does not seem to us significant that instead of DeGraff receiving a check directly from the petitioners, he is paid by an association to which petitioners belong, and to which petitioners contribute dues for the express purpose among others of securing the services of DeGraff or somebody like him to be shared among the members. See Judge Learned Hand in *Bromze* v. *Nardis Sportswear,* 165 F. 2d 33. What is important is the scope and continuity of the activities here in New York whether performed by a salaried employee or by some other breed of agent.

What is important is that petitioners maintained in New York a continuity of the activities from a permanent locale. As the Court said in *Blount* v. *Peerless Chemical (P. R.) Inc.,* 316 F. 2d 695, quoting with approval from Note 104 of Pa. Law Rev. 381, 402, DeGraff performs for the defendant "such an overwhelming portion of its busi-

ness that the latter has achieved most of the advantages which would accrue if the corporation performed the activity itself". It is distinctly unpragmatic to say that the defendant does not do business here in New York, because DeGraff's salary is not paid directly by it but is paid rather through an intermediary formed for just this purpose.

And DeGraff in our view does just this; performs an overwhelming portion of the defendant's business and performs it in New York.

Most of defendant's sales effort takes place in New York and is performed by DeGraff. By selling, we do not mean "mere solicitation". In selling anything, one must first determine the market for that which one sells. It is necessary to search out the sources of business. In current parlance, this is known as market research, and in places and at times market research has become quite "scientific". Whether performed scientifically or not, it is an important management function. DeGraff's contract required him:

> "to gather all available information on specialized group movements and forward such advice to interested Gray Line members; to compile data on all conventions which will occur in cities where there are interested Gray Line members, and forward such reports to such members; to advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members."

This is market research and DeGraff so called it. So far as appears from the record, DeGraff is the only source of this kind of market research for the defendants so that instead of having a Vice-President for market research, defendants have DeGraff, and DeGraff is in New York.

Perhaps the next step in selling any product or service is to package it attractively, so that it will be appealing to the prospective customer. The sole source of business

for a sight-seeing bus company is the tourist. Today, much of the tourist business is derived from groups who take off on a pre-packaged pre-arranged tour including all elements of such a tour, transportation, lodging, etc. For defendants, it is DeGraff who arranges tours. After consultation with large travel agents who he calls wholesalers and other carriers such as airlines, DeGraff will plan and arrange pre-packaged group tours which will include sight-seeing trips on the petitioners' buses, so as to promote business for them.

Here again, the work of packaging these tours is essential to the prosperity of the defendants' sight-seeing business. It could of course be done by an employee, but that employee if he did not work out of a New York office would have to be in New York with great frequency for here is where all the airlines are and here is where most of the large travel agents are. The defendant could do this work by an officer in charge of tour-planning and promotion. But instead DeGraff does it, and DeGraff is in New York.

After performing the market research, packaging and promoting the service, the next sales function would be solicitation, and here DeGraff also performs an important service. He maintains 8 to 11 salesmen who call on the trade. He tries to call on a travel agent four times a year. Some of the big ones would be called 25 times a year. It is true, of course, that solicitation by and of itself has repeatedly been held not to constitute doing business. However, in all of these cases, the salesman was no more than a mere order taker. Orders were required to be transmitted to the home office for acceptance. DeGraff's authority is much broader. Since for the most part he is dealing with the large travel agents, what he calls "wholesalers", these wholesalers are entitled to override commissions on the business they write. Part of DeGraff's function was to negotiate the override commission and thus the net price to the customer.

The last major service performed by DeGraff for defendants is the reservation service. Sixty percent of the gross business of the defendant, Tanner Motor Tours of Las Vegas, is booked out of DeGraff's office.

Three-sevenths of the booking of petitioners' Grand Canyon Tour on which respondents were injured were booked out of DeGraff's office in New York. DeGraff's reservation was, as DeGraff himself said, essential to effective merchandising of the tour and resulted in approximately $120,000 a year in bookings to petitioners.

Six of DeGraff's clerks spent part of their time working on the Grand Canyon reservations.

We would submit that petitioners had immersed themselves deeply in New York on a systematic regular basis. DeGraff's activities on behalf of petitioners are so widespread and so important to the proper conduct of their business that if they had not made the arrangements that they did with DeGraff through the Gray Line, they would have had to open an office manned by their own officials in New York to undertake substantial similar services.

The systematic conduct of these widespread and crucial activities in the New York market by petitioners securing for petitioners, as they do, all of the benefits afforded by such activities including the right to resort to the New York Courts for protection of their rights, warrants the imposition of jurisdiction upon them and justifies any inconvenience that might be imposed upon them by requiring them to defend in New York, this lawsuit, arising, as it does out of the very activities performed by petitioners in New York.

Having entered into the New York market on the systematic continuous basis from a permanent locale for the purpose of seeking out business from travel agencies, other transportation companies and individuals, and actually maintaining in New York an office through which

arrangements for this travel business could be finalized which generated three-sevenths of their business amounting to $120,000 a year, we submit that petitioners cannot be heard to complain that it would be unfair to require them to defend this lawsuit in New York.

This is not a case where the defendant had no contact with the forum state or conducted merely casual or isolated activities therein.

POINT II

There is presented for review no constitutional issue of widespread or general application.

As this Court said in *International Shoe Corp.* v. *State of Washington*, 326 U. S. 310, 319, 320, there is no mechanical or quantitive test to mark the boundary line between those activities which justify the subjection of the corporation to sue and those who do not. "Whether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

What is required is a weighing of "such activities of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend . . .", *International Shoe Corp.* v. *State of Washington*, 326 U. S. 310, 317. Under such circumstances each case must pretty much be decided on its own peculiar facts bearing in mind the principles enunciated by this Court in *International Shoe*. Having laid down the principles involved, it would serve no useful purpose for this Court to involve itself in the thicket of the many varying factual situations which are presented by the literally thousands of cases decided or to be decided under these principles.

Some of the factors which have been considered in the past, in deciding whether or not jurisdiction would apply, have been where title to goods shipped into the forum state passed and whether or not payment could be accepted in the forum state, *International Harvester* v. *Kentucky*, 234 U. S. 579, whether or not defendant was represented in the State by a local branch or by separate local branch corporation, *Sterling Novelty Corp.* v. *Frank & Hirsch Distributing Co.*, 299 N. Y. 208, and whether or not the local agent could bind the out-of-state principal, *Miller* v. *Surf Properties*, 4 N. Y. 2d 475.

There are many other factors that have been considered in the past by the Courts. These factors recur variably from case to case, but no one factual situation is exactly like another. A decision by this Court in this case could decide only this case and no other case because of the variable nature of the factual situations presented and the necessity in each case to weigh the quality of the contacts with the forum state against the inconvenience to the defendant of requiring it to defend there.

Because there are so many variables in the factual situations presented, there is no conflict between the decision of the Court of Appeals in the Second Circuit in the case at bar and the decision in the Fifth Circuit in *Turner* v. *Jack Tar Grand Bahama, Ltd.*, 353 F. 2d 954.

The contacts of the defendant's hotel with the State of Texas in the *Turner* case, *supra*, were far less than the contacts of petitioners in the State of New York in this case. There was only isolated irregular activity consisting of the occasional forwarding of reservations from affiliated hotels and the occasional holding of meetings by the principals of the defendant corporation in Texas.

No such circumstances as existed in the case at bar, existed in the *Turner* case, *supra*. There was in *Turner* no energetic and widespread marketing activities resulting in

such a substantial percentage of the defendant's total business being generated in the forum as it is in the case at bar. Nor were the activities in the forum state so crucial to the proper conduct of the business as they are in the case at bar.

CONCLUSION

Petition for a writ of certiorari should be denied.

Respectfully submitted,

JACOB D. FUCHSBERG,
Attorney for Respondents,
250 Broadway,
New York, N. Y.